

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF CALIFORNIA

LAWRENCE ROBINSON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. CV-F-02-5418 OWW
(No. CR-F-97-5129 OWW)

MEMORANDUM DECISION AND
ORDER DENYING PETITIONER'S
MOTION TO LEAVE TO FILE TWO
SUPPLEMENTAL ISSUES (Doc.
369)

By Memorandum Decision and Order filed on October 23, 2007
(Doc. 366), Petitioner's motion to vacate, set aside or correct
sentence pursuant to 28 U.S.C. § 2255 was denied.

On November 19, 2007, Petitioner filed a motion for leave to
file two supplemental issues pursuant to Rule 15(c), Federal
Rules of Civil Procedure. Petitioner contends that, on September
1, 2007, he obtained a copy of the transcript of the change of
plea proceedings on June 8, 2000 in *State of North Carolina v.*
Omar Lee August, File No. 98 CRS 38585. Petitioner claims that
this transcript established that government witness Omar August

1 lied during his testimony at trial and that the United States
2 knowingly withheld material evidence or knowingly used or failed
3 to correct the perjured testimony of Omar August.

4 Petitioner cannot rely on Rule 15(c), Federal Rules of Civil
5 Procedure, to amend his Section 2255 motion to include the claims
6 he seeks to assert. Petitioner's Section 2255 motion was timely
7 filed on August 8, 2002.¹ Petitioner's Section 2255 motion
8 contended he suffered (1) prosecutorial misconduct because the
9 Government solicited false and misleading testimony before the
10 Grand Jury resulting in the Indictment and (2) ineffective
11 assistance of counsel during pre-trial, trial and appellate
12 proceedings because defense counsel failed to "take appropriate
13 steps necessary in objecting and filing suppression motions to
14 preserve Petitioner's constitutional right to challenge federal
15 jurisdiction under the Hobbs Act." As detailed in the
16 Memorandum Decision and Order filed on October 23, 2007,
17 Petitioner's claims were based on his contention that, because of
18 evidence that Videotronics' business license had expired on March
19 31, 1996, the business could not have been operating in
20 interstate commerce.

21 In *Mayle v. Felix*, 545 U.S. 644 (2005), the Supreme Court
22 held that the Ninth Circuit's understanding of the relation-back
23 standard under Rule 15(c) which allowed an amendment to a habeas

24
25 ¹By Order filed on September 6, 2006, Petitioner's motion was
26 dismissed as untimely (Doc. 351). However, by Order filed on June
12, 2007, Petitioner's motion to vacate the September 6, 2006 Order
was granted (Doc. 362).

1 petition to "relate back" to the date of the original petition
2 "so long as the new claim stems from the habeas petitioner's
3 trial, conviction or sentence" was too broad. The Supreme Court
4 held that an amended claim in a habeas petition relates back for
5 statute of limitation purposes only if it shares a "common core
6 of operative facts" with the original claim or claims.

7 There is no "common core of operative facts" between the
8 claims alleged in the Petitioner's Section 2255 motion and the
9 claims he seeks to add by amendment under Rule 15(c) based on his
10 contention that Omar August lied at the time he testified in
11 Petitioner's case that he did not expect any leniency in the
12 North Carolina state court proceedings in return for his trial
13 testimony and that the United States knowingly withheld material
14 evidence and knowingly used or failed to correct August's
15 perjured testimony.

16 By Memorandum Decision and Order filed on October 23, 2007
17 (Doc. 366), Petitioner's motion to vacate, set aside or correct
18 sentence pursuant to 28 U.S.C. § 2255 was denied. Petitioner
19 could argue that the motion to amend arguably be deemed a motion
20 for relief from judgment pursuant to Rule 60(b), Federal Rules of
21 Civil Procedure. Even if so deemed, Petitioner would not be
22 entitled to relief because Petitioner is attempting to file a
23 second or successive petition and must first obtain authorization
24 from the Ninth Circuit Court of Appeals to do so. In *Thompson v.*
25 *Calderon*, 151 F.3d 918, 921 (9th Cir.), *cert. denied*, 524 U.S.
26 965 (1998), the Ninth Circuit explained:

1 In most cases when the factual predicate for
2 a Rule 60(b) motion also states a claim for a
3 successive petition under 28 U.S.C. § 2244(b)
4 ..., the Rule 60(b) motion should be treated
5 as a successive habeas petition. This is
6 consistent with general habeas corpus
jurisprudence, for a 'Rule 60(b) motion
following the entry of a final judgment in a
habeas case raises policy concerns similar to
those implicated by a second petition'
.....

7 In *Gonzalez v. Crosby*, 545 U.S. 524 (2005), the Supreme Court
8 discussed the interaction between Rule 60(b), Federal Rules of
9 Civil Procedure, and the AEDPA. After noting that the AEDPA and
10 its decisions make clear that a "claim" "is an asserted federal
11 basis for relief from a ... judgment of conviction", *id.* at 530,
12 the Supreme Court stated:

13 In some instances, a Rule 60(b) motion will
14 contain one or more 'claims.' For example,
15 it might straightforwardly assert that owing
16 to 'excusable neglect,' Fed. Rule Civ. Proc.
60(b)(1), the movant's habeas petition had
omitted a claim of constitutional error, and
seek leave to present that claim ...
Similarly, a motion might seek leave to
17 present 'newly discovered evidence,' Fed.
Rule Civ. Proc. 60(b)(2), in support of a
18 claim previously denied ... Or a motion might
19 contend that a subsequent change in
substantive law is a 'reason justifying
20 relief,' Fed. Rule Civ. Proc. 60(b)(6), from
the previous denial of a claim ... Virtually
every Court of Appeals to consider the
21 question has held that such a pleading,
although labeled a Rule 60(b) motion, is in
22 substance a successive habeas petition and
should be treated accordingly

23 We think those holdings are correct. A
24 habeas petitioner's filing that seeks
vindication of such a claim is, if not in
25 substance a 'habeas corpus application,' at
least similar enough that failing to subject
26 it to the same requirements would be

1 'inconsistent with' the statute. 28 U.S.C. §
2 2254 Rule 11. Using Rule 60(b) to present
3 new claims for relief from a state court's
4 judgment of conviction - even claims couched
5 in the language of a true Rule 60(b) motion -
6 circumvents AEDPA's requirement that a new
7 claim be dismissed unless it relies on either
8 a new rule of constitutional law or newly
9 discovered facts. § 2244(b)(2). The same is
10 true of a Rule 60(b)(2) motion presenting new
11 evidence in support of a claim already
12 litigated: even assuming that reliance on a
13 new factual predicate causes that motion to
14 escape § 2244(b)(1)'s prohibition of claims
15 'presented in a prior application,' §
16 2244(b)(2)(B) requires a more convincing
17 factual showing than does Rule 60(b).
Likewise, a Rule 60(b) motion based on a
purported change in the substantive law
governing the claim could be used to
circumvent § 2244(b)(2)(A)'s dictate that the
only new law on which a successive petition
may rely is 'a new rule of constitutional
law, made retroactive to cases on collateral
review by the Supreme Court, that was
previously unavailable.' In addition to the
substantive conflict with AEDPA standards, in
each of these three examples use of Rule
60(b) would impermissibly circumvent the
requirement that a successive habeas petition
be precertified by the court of appeals as
falling within an exception to the
successive-petition bar. § 2244(b)(3).

18 In most cases, determining whether a Rule
19 60(b) motion advances one or more 'claims'
20 will be relatively simple. A motion that
21 seeks to add a new ground for relief ... will
22 of course qualify. A motion can also be said
23 to bring a 'claim' if it attacks the federal
24 court's previous resolution of a claim *on the*
merits, since alleging that the court erred
by denying habeas relief on the merits is
effectively indistinguishable from alleging
that the movant is, under the substantive
provisions of the statutes, entitled to
habeas relief.

25 *Id.* at 531-532. However, the Supreme Court ruled:

26 That is not the case ... when a Rule 60(b)

1 motion attacks, not the substance of the
2 federal court's resolution of a claim on the
3 merits, but some defect in the integrity of
the federal habeas proceedings.

4 *Id.* at 532. The Supreme Court noted:

5 Fraud on the federal habeas court is one
6 example of such a defect. See generally
7 *Rodriguez v. Mitchell*, 252 F.3d 191, 199 (CA2
8 2001) (a witness's allegedly fraudulent basis
9 for refusing to appear at a federal habeas
10 hearing 'relate[d] to the integrity of the
11 federal habeas proceeding, not to the
integrity of the state criminal trial'). We
note that an attack based on the movant's own
conduct, or his habeas counsel's omissions,
see, e.g., *supra*, at 530-531, ordinarily does
not go to the integrity of the proceedings,
but in effect asks for a second chance to
have the merits determined favorably.

12 The claims Petitioner seeks to add by amendment do not implicate
13 the integrity of the Section 2255 proceedings but, rather the
14 integrity of the trial proceedings resulting in his conviction.
15 Therefore, Petitioner is attempting to assert claims in a second
16 or successive Section 2255 motion. This Court does not have
17 jurisdiction to consider the claims unless and until Petitioner
18 obtains authorization to file a second or successive Section 2255
19 motion for the Ninth Circuit Court of Appeals. *United States v.*
20 *Allen*, 157 F.3d 661, 664 (9th Cir. 1998). The alleged facts of
21 whether a witness was provided leniency was covered extensively
22 on cross-examination at trial. The witness August testified in
23 Petitioner's trial on January 29, 1999. August was sentenced on
24 June 8, 2000 in North Carolina. These alleged facts were easily
25 ascertainable, but have not been timely asserted.

26 ACCORDINGLY, as set forth above, Petitioner Lawrence

1 Robinson's motion for leave to file two supplemental issues
2 pursuant to Rule 15(c), Federal Rules of Civil Procedure is
3 DENIED.

4 IT IS SO ORDERED.

5 Dated: December 5, 2007

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE